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No. 416.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

CHARLES BELAND,
Petitioner,

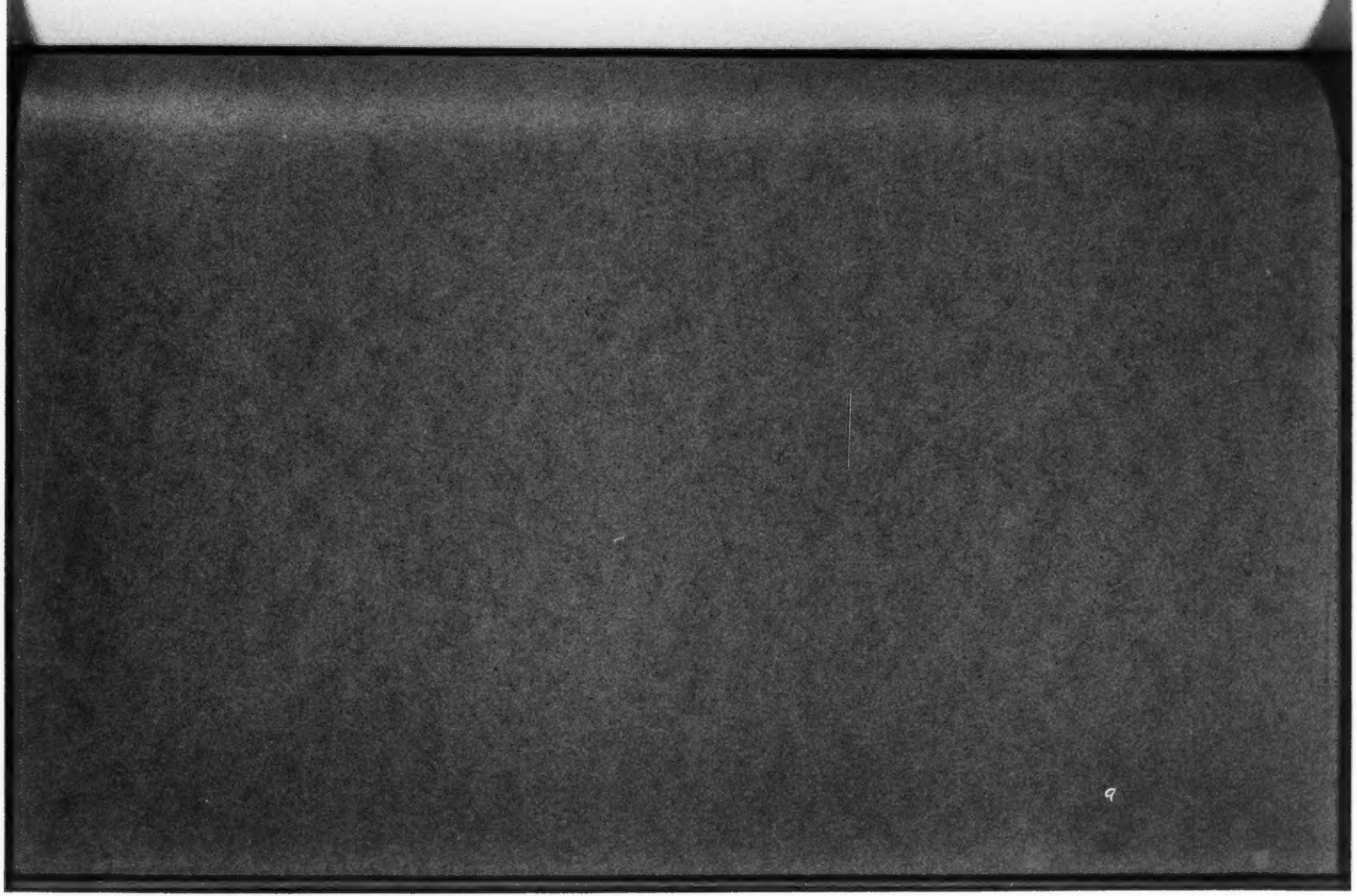
vs.

UNITED STATES OF AMERICA,
Respondent.

On Denial of a Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Petition For Rehearing

CHARLES BELAND,
Petitioner Pro Se.



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May It Please This Honorable Court:

(1) Petitioner earnestly urges this Honorable Court to reconsider its decision denying the writ of certiorari prayed for, which denial of said writ was rendered November 9, 1942, and to set aside said order of denial by granting a re-hearing of the issues involved toward the end that the writ prayed for be granted for the reasons herein set forth, supported by the following authorities:

U. S. ex rel Umbenhowar v. McDonnell, 11 Fed. Supp. 1014;

12 *Corpus Juris*, page 1103;

Ex Parte Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835;

Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127;
Malloy v. South Carolina, 237 U. S. 180, 35 S. Ct. Rep. 507;
Smith v. Cockrill, 6 Wall. 756;
Beazell v. Ohio, 269 U. S. 167, 46 S. Ct. Rep. 68.

The authorities hereinbefore listed penetratingly and overwhelmingly hold to the contrary the government's contentions, that in the present case at bar, the judgment and sentence and the statute involved (Sections 2 and 3 of the Act of August 12, 1937, c. 598, 50 Stat. 627, Internal Revenue Code, Title 26, U. S. C., Section 2557 (b) (6) and (7)) are not ex post facto.

A case directly in point, supporting petitioner's contentions, is the Umbenhowar case, *supra*. There, Section 716b, Title 18 U. S. C. A., enacted June 29, 1932, was involved. The petitioner in that case committed an offense *five days prior* to the passage and effective date of Section 716b, known as the Conditional Release Law.

He was tried, convicted, and sentenced *several months after* the effective date of the said statute.

Subsequently, after Umbenhowar had served his sentence, minus the Good Time allowances for good conduct provided for under Section 710, Title 18, U. S. C. A., which statute had become subsidiary to, and partially inoperative because of Section 716b, the government sought to hold Umbenhowar as a prisoner conditionally released under the said Section 716b. Habeas corpus was sued for, granted, and upon full inquiry into the facts and laws involved, the relator was ordered discharged from custody.

In a well written opinion, the District Judge held that the statute was ex post facto as to the relator, and referring to the statute said: " * * * such legislation can only refer to subsequent crimes," and further, with approval quoted Justice Marshall's definition of ex post facto laws previously stated by petitioner in his original brief at page 14.

The District Judge re-emphasized the rule clearly stated in 12 Corpus Juris, page 1103: "A law which deprives an accused person of any *substantial right* or *immunity* possessed by him before its passage is ex post facto as to prior offenses." (Italics ours.) Citing cases.

All that was involved in the Umbenhowar case was the question whether the Good Time allowance earned by him under Section 710, for an offense committed before Section 716b was enacted, entitled the relator to complete freedom from parole supervision as provided by the said Section 716b, or whether he came within the terms of the statute latterly enacted merely because he was tried, convicted, and sentenced *after* that Conditional Release Law was passed. Be it noted here that the government did not prosecute an appeal from the District Judge's decision, contenting itself with the well established rule that the prior offense, that is, the fact that the offense was committed *prior* to the enactment of Section 716b did not rob the petitioner of those *immunities* or *substantial rights* as discussed by Judge Woodward.

But in the instant case, we find a different status created against this petitioner, and against those *substantial rights or immunities* possessed by him in

1926, and in 1935, when he was prosecuted for violations of the narcotic laws, which were *prior* to August 12, 1937, when the challenged statute herein involved was passed.

The two previous convictions of petitioner, as set out in the information filed against him November 10, 1941, occurring prior to the passage and effective date of Section 2557, Title 26, U. S. C. A., being an indispensable part of that information, makes of that information one which would be of no efficacy whatsoever were those allegations as to the *prior convictions* extrapolated. We shall advert to this later herein.

The government's contentions, citing *McDonald v. Massachusetts*, 180 U. S. 311, and *Graham v. West Virginia*, 224 U. S. 616 (brief for the United States, p. 7), that the third conviction for conspiracy justified the heavier penalty, and that such is the statute's plain implications affecting such third conviction, would be tenable, provided the two previous convictions were for offenses committed *after* the passage of the act here challenged.

But the government's position must be held as untenable when it seeks to bring within the act's penal provisions offenses committed long before the act went into effect.

We cannot here blend the rabbit and the wolf, for the criminal information filed against petitioner is woven entirely of subject matter occurring before the act was passed, and blended with a subsequent offense nowhere authorized by the Congress. H. Rep. No. 1122, 75th Cong., 1st Sess., pp. 2-3.

If it had been the Congress' intention to include within the scope of Section 2557, offenders of the narcotic laws *prior* to enactment of Section 2557, it is reasonable to believe the Congressional report would have carried some mention of that intention. Furthermore, had there been any question of the retroactive phases of the statute creating ex post facto situations, certainly the report would have carried some mention by the Attorney General acting in an advisory capacity to the House Judiciary Committee. We can find no such observations in the report.

We respectfully contend that what occurred in the instant case when the information was filed against petitioner not only robbed him of certain *substantial rights and immunities*, but that the statute was ex post facto as to him. It was well held, in *United States v. Hall*, 6 Cranch, 171:

> "A statute which, in relation to the *offense or its consequences*, alters the situation to one's disadvantage, is ex post facto and void." (Italics ours.) See *In Re Murphy*, 87 Fed. 549.

Petitioner respectfully submits that the facts herein indisputably show his situation was unlawfully and unconstitutionally altered, by the invocation of Section 2557, and the information filed thereunder alleging in substance those *prior* convictions which occurred *prior* to the effective date of the act.

Peculiarly, petitioner's case parallels the Umbenhowar case, yet is of a more aggravated nature in that the respondent relies upon this challenged statute to restrain petitioner under an augmented sentence, in

the face of Judge Woodward's decision that prior offenses, operative under less harsher pains and penalties, cannot be disregarded and greater punishment visited upon the prisoner.

Additionally, we disagree with the respondent's argument, on page 6 of respondent's brief, note 3 in the margin, wherein it is argued that the statute is not ex post facto in its terms or its implications because Congress' "plain and unambiguous language" in the act itself "does not admit of (petitioner's) suggested construction" that it is ex post facto.

In petitioner's original brief, it was contended that the act itself was and is susceptible of two interpretations. Does the language in the act definitely say that *previous convictions prior to* the enactment of the statute come within its purview or terms? The absence of such a definite provision in the act is plain from a reading of the same.

This very omission presents grave question as to the statute having retroactive force to the extent that it absorbed within its scope and orbit offenses occurring before the act was passed.

(2) As to the applicability of this Court's decision in the *Skinner v. Oklahoma* case, No. 782, October Term, 1941, what better proof can there be as to the discriminatory features of this legislation (Sec. 2557) in singling out narcotic law violators, than the House Rep. No. 1122, 75th Cong., 1st sess., pp. 2-3, recited by respondent at page 10 in its brief, in the margin space as note 9. Nothing in the report treats with violators of the Mann Act, violators of the Dyer Act,

counterfeiters, users of the mails in schemes to defraud, and violators of countless other Federal laws, in the Congress' efforts to control crime.

Since it is a well established rule that Courts will take judicial notice of the facts, the Department of Justice reports will show conclusively, and beyond a peradventure of doubt, that countless thousands of Federal prisoners (now confined) and those under Federal parole are recidivists, thrice convicted, and perhaps more times than that, of similar offenses under the Federal Code, and yet no Federal habitual criminal act covers those offenses.

Respondent admits that this Court declared the Oklahoma sterilization law in the Skinner case unconstitutional because it was discriminatory legislation. Respondent adds, however, that this Court was moved to strike down the Oklahoma law because of the "devastating nature of the punishment imposed," and that this factor "weighed heavily in this Court's judgment that the statute was not *sufficiently meticulous in avoiding discrimination and unwarranted application.*" (Italics ours.)

We are moved to observe that here again respondent waxes inconsistent, and attempting to make the rabbit and the wolf one; and too, to make the rabbit chase the wolf.

This Honorable Court struck down the Oklahoma law because it denied the citizens of that state the equal protection of the laws guaranteed by the Fourteenth Amendment. The procedure thereunder that law, which would result in vasectomy (if the offender

were a male) was a secondary consideration discussed by this Honorable Court. The line of demarcation between constitutionality and unconstitutionality of that statute concerned the special offenses exempt from prosecution. As to the "devastating nature" of the punishment, how more "devastating" can the nature of that punishment be construed as against hanging, execution by a firing squad (in Utah), or the lethal gas chambers in Nevada and Arizona, and execution by electrocution in New York and other states?

The "devastating nature" of punishment, while "weighed heavily" by this Court in the Skinner case, as respondent suggests, was not the constitutional question involved. Did the Oklahoma law discriminate amongst thrice convicted felons under Oklahoma law? This Court held that such discrimination existed.

Turning to this case, discrimination against petitioner because of allegedly violating the narcotic laws for a third time obtains as it does against no other twice or thrice convicted offender of other Federal laws. We contend that such punishment as imposed herein, is also "devastating," but we do not ask this Honorable Court to weigh the "devastating nature" of the punishment imposed here so much as we do ask this Court to weigh the discriminatory phases of this legislation for the first time, and to strike this legislation down because it does discriminate against petitioner, and is unconstitutional in contravention of the Fourteenth Amendment.

Conclusion

Petitioner respectfully submits that the unusual circumstances herein involved have no counterpart in any of the Federal reports that we can find covering Federal cases involving Federal prisoners where the subject of ex post facto laws are concerned.

These unusual circumstances confronting petitioner, growing out of the information filed against him under the provisions of Section 2557, merits the closest scrutiny of this Honorable Court. For the first time in this Court is the question raised of the constitutionality of the Harrison Anti-Narcotic Habitual Criminal Law. In this law violative of Article 1, Section 9, Clause 3, of the Constitution?; is this law violative of the Fifth Amendment wherein a term of imprisonment greater than a year and in prison can be imposed on a criminal information (exclusive of being charged by presentment or indictment of a Grand Jury)?; is this law violative of the Fourteenth Amendment?; is this law violative of the double jeopardy guaranty of the Constitution?

The answers to these questions covering the constitutionality of the statute challenged here, and the proper disposition of this case because of the facts involved covering the *previous* convictions *prior* to the enactment of the statute, can best ensue only by the fulsome consideration of this Court through the granting of a re-hearing, the granting of the writ prayed for, and decision thereafter by this Court setting a precedent so that in future there occur no confusion

or attendant injury to any prisoner before the bar in like circumstances.

To this end, petitioner subscribes his prayer that this Honorable Court grant the pleas herein made.

Respectfully submitted,

CHARLES BELAND,
Petitioner Pro Se.